

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )

Policy and Rules Concerning the )  
Interstate, Interexchange Marketplace )

CC Docket No. 96-61

Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

DOCKET FILE COPY ORIGINAL

U S WEST, INC. COMMENTS

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## SUMMARY

In these comments, U S WEST, Inc. (“USW”) asserts that the Federal Communications Commission (“Commission”) should retain the relevant product and geographic market definitions relating to interstate services adopted in Competitive Carrier. In any market power analysis, however, USW cautions the Commission to recognize that market share is not the sole determinant of market power and that other factors such as barrier to entry and economic realities must be taken into account. In doing so, the Commission will conclude that a Bell Operating Company (“BOC”) does not have the power to control price or exclude competition in the interstate interexchange market and that its tentative plan to impose separate subsidiary requirements for BOC provision of out-of-region interstate services should be abandoned.

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**U S WEST, INC. COMMENTS**

In a recently issued Notice of Proposed Rulemaking,<sup>1</sup> the Federal Communications Commission ("Commission") seeks comment on several aspects of non-dominant carrier regulation, in light of the provisions of the newly enacted Telecommunications Act of 1996.<sup>2</sup> U S WEST, Inc. ("USW") hereby files these comments on behalf of U S WEST Communications, Inc. ("U S WEST") concerning sections IV and V of that NPRM.

In its NPRM, the Commission examines the definitions of relevant product and geographic markets in conjunction with its proposal to adopt a policy of mandatory detariffing for non-dominant providers. A non-dominant carrier is one

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<sup>1</sup> In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Notice of Proposed Rulemaking, FCC 96-123, rel. Mar. 25, 1996 ("NPRM").

<sup>2</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

which lacks market power.<sup>3</sup> Because a firm without market power cannot, by definition, price its competitive services at super-competitive levels, the Commission proposes to continue to use market power analysis as the touchstone of non-dominant carrier deregulation.

The Commission's market power approach is especially appropriate in light of Congress' directive in the 1996 Act to "promote competition and reduce regulation" in the provision of telecommunications services.<sup>4</sup> However, several aspects of the market power approach set forth in the NPRM cause concern, or at least require more extensive analysis.

#### I. THE APPROPRIATE RELEVANT MARKET IS NATIONWIDE INTEREXCHANGE SERVICES

Within the context of the current NPRM, U S WEST supports, as the relevant product and geographic market, "interstate, domestic, interexchange telecommunications services,"<sup>5</sup> at least for initial dominance analysis. While the Commission could engage in complex and extended analyses to define the market more narrowly, now is an inappropriate time to do so, because services, technologies

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<sup>3</sup> 47 CFR § 61.3(o).

<sup>4</sup> 1996 Act, 110 Stat. at 56.

<sup>5</sup> This was the product and geographic market definitions the Commission utilized in its Competitive Carrier proceeding. See In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554, 557 ¶ 5 (1983); see also Fifth Report and Order, 98 FCC 2d 1191, 1206 ¶ 21 (1984).

and “markets” are so dynamic. Technology is blurring the distinction between wired and wireless services and between interexchange and exchange services. Further, there is currently excess capacity in interexchange markets, and soon likely to be more.<sup>6</sup> Consequently, determining substitutability is likely to be difficult and complex, and any such determination would be immediately obsolete.

In the future, those services now commonly referred to as “local exchange” and “interexchange” services will likely be combined in such a way that any distinction between the two will disappear. It is anticipated that competitive providers of local exchange service will combine their offering with interexchange services in a manner which will blur, if not obliterate entirely, the differences between the two services and the two markets, as well. The Commission should recognize this likelihood and not cling to the existing dichotomy between interexchange and exchange product markets any longer than such differentiation is supported by the facts which, in all probability, will not be long. Some refinement to market power analysis, based on the assumption that this is a discrete interexchange market, is clearly necessary.

First, the Commission must recognize that no carrier holds market power in the interexchange market. Because the Commission has held that AT&T Corp. (“AT&T”) has no market power in this market, no other carrier can be found to possess market power (unless the Commission chose to reexamine its AT&T

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<sup>6</sup> In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, FCC 95-427, rel. Oct. 23, 1995 ¶ 58 (“AT&T Reclassification Order”).

decision, which would not seem reasonable). Second, the Commission must avoid transferring assumed market power (based only on market share or history) from one product or area to another without close scrutiny. An example of such a misplaced analysis could find that U S WEST's New York interexchange operations were characterized by market power despite a zero market share. As U S WEST has no market power in the provision of nationwide interstate, interexchange services, it would be clearly erroneous to ascribe any such market power to U S WEST. Even if U S WEST were assumed or found to possess market power in the provision of exchange access or exchange services in its fourteen states,<sup>7</sup> that market power would not translate into market power in the national interexchange market.

Several other observations are appropriate. First, over-reliance on market share can cause erroneous evaluations of market power. Indeed, market share often obfuscates the determination. Market share is a particularly feeble measure

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<sup>7</sup> The market for local exchange services will likely be competitive very soon. Many of the existing large interexchange providers have announced local exchange service plans, and the 1996 Act requires that incumbent local exchange carriers ("LEC") open their markets to competition via unbundled sale of network elements, reciprocal compensation and wholesale prices for resellers. These requirements limit the ability of Bell Operating Companies ("BOC") to exercise any market power in the provision of local exchange services. In addition, even without the 1996 Act, local exchange market power has been declining. Given the development of wireless technology and existing wireline competition, the Commission could not assume that a BOC has market power even in the provision of local exchange services.

of market power when such market share results from industry regulation that prohibits competition.<sup>8</sup>

Second, in any market, the relevant inquiry is not how big a company (such as U S WEST) is today, but how relevant markets would operate if U S WEST attempted to act anticompetitively. Specifically, the question is whether U S WEST, for example, has the power to control price and to exclude competition. If it cannot, even if it has 100% market share, it does not have market power.<sup>9</sup>

Third, reliance on market share alone ignores important market information, such as rivals' entry and expansion abilities.<sup>10</sup> Key factors in evaluating market power include barriers to entering or operating in a particular market, market trends, and availability of excess capacity. Market power can persist only when

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<sup>8</sup> MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1107 (7th Cir. 1983), cert. denied, 464 U.S. 891 (1983); Southern Pacific Communications Co. v. A.T.& T., 740 F.2d 980, 1000 (D.C. Cir. 1984), cert. denied, 470 U.S. 1005 (1985); State of Ill. ex rel. Hartigan v. Panhandle Eastern, 730 F. Supp. 826, 903 (C.D. Ill. 1990), aff'd sub nom., State of Ill. ex rel. Burris v. Panhandle Eastern, 935 F.2d 1469 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992).

<sup>9</sup> See Section II, *infra*. See also Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422 (9th Cir. 1993), cert denied, 114 S.Ct. 1307 (1994); Metro Mobile CTS, Inc. v. NewVector Communications, 892 F.2d 62 (9th Cir. 1989). The Commission has previously recognized this as the relevant line of inquiry in In the Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd. 7442, 7462 ¶ 38 (1994) and AT&T Reclassification Order ¶¶ 35, 38-73.

<sup>10</sup> U.S. Department of Justice/FTC Merger Guidelines; see Krattenmaker, Lande, and Salop, Monopoly Power and Market Power in Antitrust Law, 76 Georgetown L.J. 241, 259 (1987); Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 924 (9th Cir. 1980), cert. denied, 450 U.S. 921 (1981).

there are significant and continuing entry barriers.<sup>11</sup> With the exception of statutory requirements for BOC in-region provision of interstate, interexchange services, there are no regulatory barriers to entry into the interexchange services market.<sup>12</sup> With respect to the availability of excess capacity, the Commission has previously found that both supply of and demand for long-distance services are “sufficiently elastic to constrain AT&T’s unilateral pricing decisions,” and that other providers in the market “have enough readily available excess capacity to constrain AT&T’s . . . behavior.”<sup>13</sup>

Finally, the Commission should be mindful of the economic realities of the long-distance market, a market where customers have years of experience in making choices. Customers have virtually no recognition of U S WEST as a long-distance provider, which further diminishes the possibility that U S WEST could exercise market power. Given the mega-competitors that already exist in the interexchange services market, such as AT&T, MCI Telecommunications Corporation (“MCI”), and Sprint Telecommunications, Inc., and the expected entry of some, if not all, BOCs, the market for interexchange services is already obviously competitive and will only become increasingly so.<sup>14</sup>

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<sup>11</sup> II P. Areeda & D. Turner, Antitrust Law, ¶ 505 (1978); see also U.S. v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990).

<sup>12</sup> See AT&T Reclassification Order ¶ 61.

<sup>13</sup> Id. ¶ 58.

<sup>14</sup> We note MCI’s competitive zeal: “[W]e killed off their ma. Now, let’s finish off her seven little bastards.” Business Week at p. 6 (Sep. 25, 1995)(Quoting talk show comments of MCI President of Long Distance, Timothy Price).

## II. A BOC CANNOT IN FACT OR LAW HAVE OR EXERCISE MARKET POWER IN THE MARKET FOR INTEREXCHANGE SERVICES

As USW has argued in other dockets, a BOC cannot have market power in a market for domestic interexchange services.<sup>15</sup> While BOCs are now permitted to provide interexchange services out-of-region, they have only recently been permitted to do so and have zero market presence. They will likewise have no presence in the interexchange in-region market, when allowed to enter it.<sup>16</sup> It is not logical to suggest that a BOC, as a non-player without nationwide facilities in interexchange services, can have -- much less exercise -- market power in that market.

In its NPRM, the Commission appears to have accepted as the appropriate product and geographic market a national, interexchange services market definition.<sup>17</sup> The Commission, however, expresses some concern over the adoption of such market definition, in light of the fact that BOCs will be entering this market and they may control access facilities in their local service region. The Commission's concern is misplaced, because it assumes the definition of a relevant

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<sup>15</sup> In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Notice of Proposed Rulemaking, FCC 96-59, rel. Feb. 14, 1996. USW attaches its CC Docket No. 96-21 Comments (filed Mar. 13, 1996) and Reply Comments (filed Mar. 25, 1996) and incorporates those documents herein.

<sup>16</sup> Even if intraLATA intrastate interexchange market share is counted, BOCs do not have market power in the nationwide interexchange marketplace.

<sup>17</sup> See Section I, supra.

antitrust market varies depending on whether a firm has market power in adjacent markets.<sup>18</sup> Such an approach clearly would be inappropriate because market boundaries are independent of whether a single firm wields power within a particular market.

While the Commission expresses concern over the parameters of the relevant market definitions, it actually seems to be eliciting comment not on whether the definitions continue to be appropriate but on whether a BOC possesses market power in the local exchange market, and therefore should be found dominant in the interexchange services market.<sup>19</sup> A proper antitrust analysis leads to the conclusion that a BOC could not disrupt interexchange competition within the relevant market by virtue of its control of local exchange facilities in limited geographic markets.

First, the antitrust standard for using market power in one market to harm competition in another market requires that the effect in the second market be so strong as to threaten or constitute market power in the second market.<sup>20</sup> It is

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<sup>18</sup> We urge the Commission to evaluate a BOC's potential market power by the same standard it applies to a BOC's competitors. See AT&T Reclassification Order ¶ 22.

<sup>19</sup> The Commission is misguided in this approach. The antitrust laws are concerned with behavior, not mere possession of market power. "Mere size . . . is not an offense." U.S. v. Swift & Co., 286 U.S. 106, 116 (1932). Neither size nor the possession of market power condemns a firm. Rather, monopolization requires proof of possession of monopoly power in a relevant market and willful acquisition or maintenance of it; in other words, conduct. U.S. v. Grinnell Corp., 384 U.S. 563, 570-71. Thus, antitrust cases examine whether a firm, once it is proven to have market power in a relevant antitrust market, has acted to abuse its market power such that competition is adversely affected.

<sup>20</sup> Spectrum Sports v. McQuillan, 506 U.S. 447 (1993); Davis v. Southern Bell Tel. & Tel. Co., 1994-1 Trade Cas. ¶ 70510 (S.D. Fla. 1994); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), cert. denied, 506 U.S. 1034 (1992).

ludicrous to believe a BOC could monopolize the interexchange services market, given the presence of three very large and very powerful competitors, many smaller competitors, and the entry of other BOCs. While competition could theoretically be disrupted (on a temporary basis) within a limited geographic area by an ill-motivated BOC, such disruption would be easily detected and would simply bring on more rapid entry by competitors.

Second, even if a BOC possesses market power in the provision of local exchange services,<sup>21</sup> the regulatory structure and obligations surrounding its provision of local exchange service and interexchange services prevent anticompetitive conduct.<sup>22</sup> These constraints include: regulation of access by the state and federal authorities; equal access requirements; interconnection obligations; obligations not to discriminate as to interconnection; resale of local services; unbundling of network elements; the prerequisite of facilities-based competition before a BOC may offer in-region interexchange services; and, for certain in-region interexchange services, the requirement that those services be provided through a separated affiliate with which the BOC must deal on a non-discriminatory basis vis-à-vis other providers of interexchange services.

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<sup>21</sup> See note 7, supra.

<sup>22</sup> We note that should any BOC be required to file interexchange service tariffs, it would make sense for AT&T and MCI to do so as well. No matter how U S WEST's market power is evaluated in the interexchange market, AT&T and MCI are more powerful. It would be extremely anomalous to require that tariffs be filed by new entrants, but not by experienced incumbents.

Not all of these constraints need be present to prevent the exercise of market power. We recognize that some services need not be provided through separated affiliates and that some providers need not provide equal access. We mean only to demonstrate that the constraints on BOCs are more than sufficient to prevent any exercise of market power.

III. SEPARATE SUBSIDIARY REQUIREMENTS FOR INDEPENDENT LEC AND BOC PROVISION OF OUT-OF-REGION INTERSTATE, INTEREXCHANGE SERVICES ARE UNNECESSARY

The Commission seeks comment on whether it should modify or eliminate the separation requirements as a condition for non-dominant treatment of independent LEC provision of interstate interexchange services outside their local exchange areas, and if it should apply the same requirements to BOC provision of out-of-region interstate, interexchange services.<sup>23</sup> USW wholeheartedly supports elimination of this requirement for LECs and encourages the Commission to terminate CC Docket No. 96-21 in which it has proposed to require BOCs to similarly utilize a separate subsidiary for out-of-region interstate, interexchange service.<sup>24</sup>

Requiring a separate subsidiary for BOCs' provision of out-of-region interstate, interexchange services as a precondition to non-dominant carrier status is unnecessary and inconsistent with the 1996 Act. It is also inconsistent with any

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<sup>23</sup> NPRM ¶ 61.

<sup>24</sup> See note 15, supra.

rational view of market dominance. As USW indicated in its comments in CC Docket No. 96-21, U S WEST's out-of-region operations will commence without either market share or brand-name recognition. It will clearly be non-dominant under any reasonable test.

For similar reasons, the separate subsidiary requirement currently applied to small LECs should be eliminated as well. The Commission should allow the interstate, interexchange marketplace to develop without imposing regulations inconsistent with the 1996 Act.

#### IV. CONCLUSION

For the foregoing reasons, USW urges the Commission to refrain from designating an entity as dominant based simply on the fact that that entity has a large share in some area of the telecommunications market. Rather, consistent with antitrust principles, the Commission must bear in mind that market share is not the sole determinant of market power and that other factors, such as barriers to entry, are essential to a legitimate evaluation of market power. In doing so, the

Commission will recognize the absence of any driving need to require separate subsidiaries for BOC provision of out-of-region interstate, interexchange services

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Provision of Out-of-Region )  
Interstate, Interexchange Services )

COMMENTS OF U S WEST, INC.

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## **SUMMARY**

In these comments, U S WEST, Inc. ("U S WEST") observes that the proposed out-of-region interstate, interexchange services separate subsidiary requirement for divested Bell Operating Companies ("BOC") as a precondition to non-dominant carrier status proposed in the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking is unnecessary and inconsistent with any rational view of market dominance. U S WEST's out-of-region operation will commence without either market share or brand-name recognition. It will clearly be non-dominant under any reasonable test. A separate subsidiary requirement for BOC out-of-region interLATA activities would be unnecessary and illogical.

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**COMMENTS OF U S WEST, INC.**

U S WEST, Inc. ("U S WEST") hereby files these comments on the Notice of Proposed Rulemaking in the above-captioned docket.<sup>1</sup>

In the Notice, the Federal Communications Commission ("Commission") proposes to treat "out-of-region" interstate, interexchange services offered by divested Bell Operating Companies (or "BOC") as offered by a "dominant carrier" unless those services are offered via a separate subsidiary which maintains separate books, owns its own switching and transmission facilities, and purchases services from BOC exchange carriers pursuant to tariff.<sup>2</sup> As the rules pertaining to dominant carriers are exceptionally onerous in a competitive market, the assumption is that all BOCs will choose a separate subsidiary operation for their newly offered interLATA services.

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<sup>1</sup> In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21, Notice of Proposed Rulemaking, FCC 96-59, rel. Feb. 14, 1996 ("Notice").

<sup>2</sup> Id. ¶ 13.

The newly enacted Telecommunications Act of 1996 (or "Act") expressly permits BOCs to provide "out-of-region" interLATA services<sup>3</sup> -- something new, as the Modification of Final Judgment had prohibited all BOC interLATA offerings.<sup>4</sup> In essence, BOCs are prohibited from offering interLATA services which originate in their service territories, as defined in the Act, until after a competitive checklist has been met.<sup>5</sup> BOCs may, however, provide out-of-region interLATA services immediately. The Act explicitly does not require separate subsidiaries for such activities.<sup>6</sup> In addition, BOCs can provide "incidental" interLATA services which originate in their service regions.<sup>7</sup> Only one subset of these activities -- information storage and retrieval -- must be offered via a fully separate subsidiary under the Act.<sup>8</sup> The Notice proposes to impose (as a practical matter) separate subsidiary

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<sup>3</sup> Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56, 86 § 271(b)(2). "A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996[.]" (Emphasis added.)

<sup>4</sup> United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 188-89 (D.D.C. 1982), aff'd, sub nom., Maryland v. United States, 460 U.S. 1001 (1983).

<sup>5</sup> BOCs must meet the requirements of the "competitive checklist" (Act at Stat. 88-89 § 271(c)(2)(B)) in order to "provide interLATA services originating in any of its in-region States[.]" Id. at Stat. 86 § 271(b)(1).

<sup>6</sup> Id. at Stat. 86 § 271(b)(1). "A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States . . . if the Commission approves the application of such company for such State under subsection (d)(3)." (Emphasis added.)

<sup>7</sup> Id. at Stat. 86 § 271(b)(3). "A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services . . . originating in any State after the date of enactment of the Telecommunications Act of 1996." (Emphasis added.)

<sup>8</sup> Id. at Stat. 92 § 272(a)(2). "The services for which a separate affiliate is required by paragraph (1) are: (C) InterLATA information services, other than electronic publishing . . . and alarm monitoring services."

requirements on BOC out-of-region interLATA activities (but not, presumably, on incidental in-region activities). The theory espoused in the Notice is that independent local exchange carriers ("LEC") who offer interstate, interexchange services are classified as "non-dominant" but must utilize an affiliate in order to offer the services.<sup>9</sup> Thus, reasons the Notice, separate subsidiaries might be appropriate (at least on an interim basis) for BOC out-of-region interLATA activities as well.<sup>10</sup>

With all due respect, the concept set forth in the Notice is not a reasoned approach to implementing the new statute. Dominant carriers are defined as those carriers with market power -- those having the ability to increase profits by raising prices or restricting output.<sup>11</sup> Now that AT&T Corp. ("AT&T") has been declared to be "non-dominant" with a market share in excess of 50%, there are no "dominant" interLATA carriers.<sup>12</sup> The notion that U S WEST, a company without any market share at all in the out-of-region interLATA business, might somehow be able to exercise dominance in a market occupied by such "non-dominant" players as AT&T is simply not credible. No matter what else comes out of this docket, labeling the giant AT&T as non-dominant while at the same time defining companies with no

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<sup>9</sup> Notice ¶ 10.

<sup>10</sup> Id. ¶ 11.

<sup>11</sup> See In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1, 20-21 ¶¶55-56 (1980).

<sup>12</sup> AT&T was recently granted "non-dominant" status in this very market despite a market share well in excess of 50%. See In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, FCC 95-427, rel. Oct. 23, 1995.

market share as dominant, would simply not be defensible as an exercise in reasoned decision making. BOCs have no market share in the out-of-region interLATA market, no brand-name identification, and no other power of any sort which would ipso facto enable the BOCs to compete at all against “non-dominant” providers such as AT&T, far less to unfairly disrupt their markets.

The Notice suggests that it might be possible to justify incorporation of separate subsidiary requirements on BOCs on a theory based on something other than market power. However, in the absence of the insupportable determination of “dominance,” upon which the Notice is premised, there is no conceivable justification for imposing a separate subsidiary requirement. The Act certainly did not contemplate such a requirement, and Congress was not bashful about imposing its own statutory subsidiary rules in other areas.<sup>13</sup> The likelihood of U S WEST offering to itself discriminatory access for terminating interLATA services is extremely remote, and accounting safeguards are more than adequate to protect against whatever speculation still exists about cross-subsidization. Once BOCs have had an opportunity to negotiate appropriate interconnection agreements and to commence larger-scale interLATA operations, it may be time to examine how BOC interLATA services have actually developed and matured, although historically, separate subsidiary rules have proven to be uniformly negative, and

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<sup>13</sup> Act at Stat. 92-93 § 272.

U S WEST doubts that their expansion by the Commission could ever be warranted.


Here, however, there is no evidence and no record, only speculation.<sup>14</sup>

The Commission should simply terminate this docket and permit BOC interLATA services to develop within the context of the marketplace and the Act. There are obviously numerous issues of far greater importance to the public than whether BOC interLATA services offered from outside their traditional LEC serving areas need to be offered via a subsidiary.

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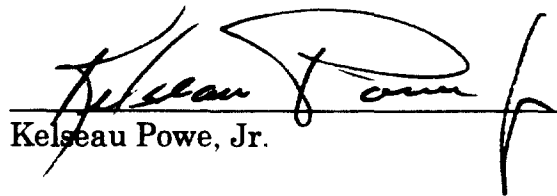
March 13, 1996

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<sup>14</sup> The Notice observes (indeed finds well nigh dispositive) that independent LECs now utilize separate subsidiaries for their interexchange services. Notice ¶ 13. This unnecessary regulation would seem a good candidate for immediate elimination, and there certainly is no reason to expand it to BOCs.

## CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 13th day of March, 1996, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC.** to be served via hand-delivery upon the persons listed on the attached service list.



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